

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

SAMUEL GONZALES,

Plaintiff and Appellant,

v.

RONALD C. PEDERSON et al.,

Defendants and Respondents.

E049226

(Super.Ct.No. CIVSS803838)

OPINION

APPEAL from the Superior Court of San Bernardino County. Frank Gafkowski, Jr., Judge. (Retired judge of the former Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of James DeAguilera and James DeAguilera for Plaintiff and Appellant.

Granowitz, White and Weber and Steven R. Weber for Defendants and Respondents.

Plaintiff and appellant Samuel Gonzales (the buyer) filed an action against defendants and respondents Ronald C. Pederson and Joyce M. Hanson (the sellers), and

others, arising out of alleged misrepresentations concerning the buyer's purchase of a parcel of land from the sellers. The sellers moved for summary judgment below, which the trial court granted. The buyer's sole contention on appeal is that the court was premature in entering judgment in favor of the sellers, because the action still remains pending against other named defendants. We affirm the judgment.

### FACTS AND PROCEDURAL HISTORY

Because the matter arises on summary judgment, we draw extensively from the parties' statements of undisputed facts.

The sellers purchased the subject property in 1991. At the time, the land was vacant, and consisted of a parcel of approximately 13.5 acres. The sellers were told by their realtor, when they acquired the property, that it could be subdivided more than once, but that the zoning would soon change to allow only one subdivision. The sellers met with an official in the city planning department, who told them that the property was zoned A-1. Under A-1 zoning, parcels could be subdivided into lots of a minimum of five acres. As the property was only 13.5 acres, it could be subdivided only one time. The sellers believed, as of the time of the sale to the buyer, that the property could be subdivided one time.

The sellers drew up plans and built a house on the property. In 2005, the sellers decided to list the property for sale. After an initial listing expired, they engaged defendant Joe Miller (the sellers' agent) as their real estate agent. The sellers told their agent about their understanding that the property could be subdivided one time, and they believed that their agent had also verified with the city that this was the case.

In December 2005, the sellers' agent presented an offer from the buyer, through the buyer's agent, Fabian Ojeda-Embila. The sellers' agent advised the buyer's agent that he understood the property could be subdivided once, but he expressly cautioned that the buyer should do his own investigation to confirm whether the property could be subdivided. The purchase agreement included a provision which stated that the sale was "subject to buyer to verify that property can be sub-divided once." (Upper case typeface omitted.)

The buyer's agent viewed the property with the buyer and, pursuant to the buyer's instructions, presented the buyer's offer to purchase the property in December 2005. The buyer was interested in building on the property and wanted to confirm whether it could be subdivided. On the buyer's instructions, the buyer's agent included a clause in the purchase agreement that the purchase was conditioned on the buyer's verification that the property could be subdivided one time. The buyer's agent understood that the property was zoned A-1, which meant it could be subdivided into lots of a minimum of five acres; thus, the property could be subdivided one time. After escrow opened, the buyer's agent went to the city planning department to determine whether it could be subdivided. City officials told the buyer's agent that the property could be subdivided, but that no decision could be made until papers were submitted. Among the required papers would be a slope density analysis and a possible zoning change request. The city officials also told the buyer's agent that subdivision, while possible, could be very expensive, costing several thousands of dollars. The buyer's agent relayed all of this information to the buyer. After the buyer's agent informed the buyer of the uncertainty whether subdivision would

be granted, and the likely expense, the buyer was unsure whether he wanted to proceed with the purchase.

After discussing the matter with the buyer, the buyer's agent returned to the city planning department to investigate whether a second structure could be placed on the property without subdividing. The city officials related that it was possible to build a second structure such as a guest house or casita, but that the construction would have to meet setback requirements. The second structure could not be larger than the existing home. An engineer accompanied the buyer's agent to the city planning offices to inquire about subdivision of the property. The planning department officials told the engineer and the buyer's agent that the property could be subdivided, but that it would be expensive. Many papers would have to be submitted, possibly including an environmental impact report (EIR).

After the buyer's agent informed the buyer of this information, the buyer decided to move forward with the purchase. Escrow eventually closed on the purchase in March 2006. The buyer later sought to build another home on the property, and subdivide the land. He submitted plans for the subdivision; the city, however, denied the application for subdivision, stating that the lot was too narrow and did not have sufficient street frontage to subdivide.

The buyer then filed an action for breach of contract, naming as defendants the buyer's agent (Ojeda-Embila), and the sellers (Pederson and Hanson). The complaint alleged causes of action for breach of contract, violation of Civil Code section 1102 et seq. (concerning required disclosures on transfer of residential real property), and

fraudulent concealment. The breach of contract cause of action alleged that the buyer had relied on statements in the real estate transfer disclosure statement and other documents, which had assured him he could subdivide the property, but that the sellers had breached the agreement by failing to disclose that the property could not, in fact, be subdivided. The second cause of action, breach of statute, asserted that the sellers had failed to inspect and disclose fully the condition of the property, i.e., that it could not be subdivided. The buyer also complained that his agent and broker failed to make a proper inquiry to determine whether the sellers' representations that the property could be subdivided were true. The third cause of action was predicated on the theory that the sellers either deliberately concealed or failed to properly investigate the subdivision issue, and thus knowingly made false representations that the property could be subdivided.

The sellers filed an answer, and followed up with a motion for summary judgment. As the sellers pointed out in their moving papers, the gist of the buyer's complaint was that the sellers knew that the property could not be subdivided, yet affirmatively represented that it could, or intentionally concealed from the buyer that subdivision was not possible. However, the sellers' evidence showed that they reasonably and in good faith believed that the property could be subdivided, and that belief was confirmed by the city planning officials. "Thus, a fundamental element of each cause of action of [the seller's] complaint is without a triable issue. There were no knowingly false statements and no information was intentionally withheld."

The buyer opposed the motion for summary judgment, asserting that he had "complied with the contractual requirement that he investigate whether the property

could be subdivided. [The buyer's] real estate agents made the inquiries at city hall. Ultimately, however, [the buyer] relied on the multiple listing statement, the representation of the [sellers] made by [the sellers'] real estate broker, that the property could be subdivided.”

The trial court reviewed all the statements of undisputed fact and granted the sellers' motion. It further entered judgment in favor of the sellers.

The buyer now appeals, raising as the sole issue that the entry of judgment is premature, because the action on the complaint is still pending against other defendants, such as the sellers' agent, and the agent's brokerage, ReMax Advantage.

## ANALYSIS

### I. Standard of Review

An appellate court reviews independently a motion for summary judgment, using the same three-step analysis employed by the trial courts. First, the court must identify the issues framed by the pleadings. Second, the court must determine whether the moving party has satisfied its initial burden of producing evidence to make a prima facie showing of entitlement to judgment in its favor. Third, if the moving party has made the requisite showing, a court must examine the opposition and determine whether it demonstrates the existence of a triable issue of material fact. (*Catholic Healthcare West v. California Ins. Guarantee Assn.* (2009) 178 Cal.App.4th 15, 23.)

However, the buyer's appeal does not purport to attack the trial court's ruling on the motion for summary judgment, per se. Rather, the sole issue raised on appeal is that the court erred in proceeding to enter judgment in favor of the sellers, because the

complaint still remains pending against other defendants. Under Code of Civil Procedure section 579, it has been held that allowing entry of judgment as to some parties, while the action proceeds against others, is a matter confided to the discretion of the trial court. (*Heritage Marketing & Ins. Services, Inc. v. Chrustawka* (2008) 160 Cal.App.4th 754, 764.)

## II. The Trial Court Did Not Abuse Its Discretion in Entering Judgment Against the Seller

The seller indicates that there are three remaining defendants, including the sellers' agent, and the brokerage firm that the agent worked for, ReMax Advantage. (Presumably, the third remaining named defendant is the buyer's own real estate agent, Ojeda-Embila.) The buyer argues that any liability of the sellers' agent, or the real estate agency, for alleged misrepresentations, is to be imputed to the sellers. That is, the buyer claims that all issues between himself and the sellers have not been adjudicated by the grant of summary judgment, because "[i]f any liability for alleged misrepresentations is found as to ReMax and/or Broker Miller, it will impute to [the sellers]. The result could be inconsistent judgments."

We reject the buyer's contention.

Code of Civil Procedure section 579 permits judgment to be entered against some defendants, while continuing against other defendants, "when all issues between those defendants and the plaintiff have been adjudicated, even though the action remains pending against those defendants who have not obtained adjudication of all issues." (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 578.)

Here, the sellers showed that the contract itself contained a provision placing the burden on the buyer to ascertain whether or not the property could be subdivided. By his deposition testimony, the buyer indicated that he attempted to fulfill that responsibility by having the buyer's agent and accompanying representatives inquire with the city. The buyer did not have any communication with the sellers' agent about the issue. The buyer had never spoken with the sellers at all. The buyer's agent, and the agent's assistants, told the buyer that they had checked with the city and verified that the property could be subdivided. The buyer testified that he relied on a multiple listing service document (Exhibit No. 1 to his deposition), purportedly stating that the property could be subdivided. The buyer also testified, however, that he generally did not read the documents he had been given, that he may have thumbed through them, but that he relied on what his agents told him, rather than the papers regarding the transaction. The buyer did not remember whether he was given the multiple listing paper before or after he closed escrow, but he did not read the papers until after the city had denied his application for subdivision. The multiple listing printout itself was generated by the buyer's agent, and dated March 30, 2006, a date after the escrow had closed. Thus, according to the buyer's own testimony, he did not rely, and could not have relied, on any statement in the multiple listing service document in making his decision to purchase the property for subdivision.

The causes of action stated in the complaint were for breach of contract, violation of Civil Code section 1102 et seq. (real estate transfer disclosures), and fraud. As to breach of contract, the contract itself provided that the buyer was to undertake the



responsibility to verify whether the property could be subdivided. There is no provision of the contract that the buyer can point to that the sellers breached. With respect to the real estate transfer disclosures, the statutory scheme requires the seller and a seller's agent to complete a prescribed form, disclosing certain conditions of the property and its amenities. (See Civ. Code, § 1102.6.) None of the required disclosures relate to whether the property may or may not be subdivided; the form which the sellers here filled out makes no mention or representation as to whether the property may or may not be subdivided. Thus, no false representation regarding subdivision was made on the real estate disclosure form. As to the fraud cause of action, the sellers presented evidence that they had inquired of city officials, and had been told by city officials that the property was of sufficient acreage to be subdivided one time. The buyer never presented any evidence to show that the sellers' representations were untrue, or that the sellers could not and did not reasonably believe, as of the time of the sale, that the property could be subdivided one time. There was therefore no false representation made. In addition, as the buyer's deposition testimony made clear, he relied not on any statements by the sellers, but on the representations of his own agents. In fact, he had never spoken to the sellers (or their agent) and thus had received no statements from them, upon which he could rely to his detriment, on the subject of subdivision.

The same arguments apply to the thesis that the sellers might somehow be vicariously liable for alleged misrepresentations by their agent (Miller) or his agency (ReMax). As to breach of contract, there is no provision of the contract which sellers, or their agent/agency could have breached inasmuch as the buyer took on the responsibility

for verifying whether the property could be subdivided. As to statutory disclosure, subdivision of the property is not an area of required disclosure, no representations were made in that disclosure, and the buyer did not rely on that document. As to fraud, there was no showing that anyone on the sellers side, either the sellers or their agent/agency, had knowingly made any false statement.

All issues between the sellers and the buyer have been determined. There will be no “inconsistent judgments.” There is therefore no reason to withhold judgment, and the trial court did not abuse its discretion in entering judgment for the sellers. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, overruled on another point in *Ochoa v. Superior Court*, (1985) 39 Cal.3d 159, 171.)

#### DISPOSITION

The judgment is affirmed. Costs on appeal are awarded to defendants and respondents (the sellers).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ McKINSTER

J.

We concur:

/s/ RAMIREZ

P.J.

/s/ HOLLENHORST

J.